

§ 230.167

17 CFR Ch. II (4–1–10 Edition)

distribution or publication of the communication until either the first public announcement is made or the registration statement related to the transaction is filed.

(b) *Definitions.* The terms business combination transaction, participant and public announcement have the same meaning as set forth in § 230.165(f).

[64 FR 61450, Nov. 10, 1999]

§ 230.167 Communications in connection with certain registered offerings of asset-backed securities.

PRELIMINARY NOTE: This section is available only to communications in connection with certain offerings of asset-backed securities. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of section 5 of the Act (15 U.S.C. 77e).

(a) In an offering of asset-backed securities meeting the requirements of General Instruction I.B.5 of Form S-3 (§ 239.13 of this chapter) and registered under the Act on Form S-3 pursuant to § 230.415, *ABS informational and computational material* regarding such securities used after the effective date of the registration statement and before the sending or giving to investors of a final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) regarding such offering is exempt from section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), if the conditions in paragraph (b) of this section are met.

(b) *Conditions.* To rely on paragraph (a) of this section:

(1) The communications shall be filed to the extent required pursuant to § 230.426.

(2) Every communication used pursuant to this section shall include prominently on the cover page or otherwise at the beginning of such communication:

(i) The issuing entity's name and the depositor's name, if applicable;

(ii) The Commission file number for the related registration statement;

(iii) A statement that such communication is *ABS informational and com-*

putational material used in reliance on Securities Act Rule 167 (§ 230.167); and

(iv) A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also shall explain to investors that they can get the documents for free at the Commission's Web site and describe which documents are available free from the issuer or an underwriter.

(c) This section is applicable not only to the offeror of the asset-backed securities, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction. A participant for purposes of this section is any person or entity that is a party to the asset-backed securities transaction and any persons authorized to act on their behalf.

(d) Failure by a particular underwriter to cause the filing of a prospectus described in this section will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

(e) An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

[70 FR 1615, Jan. 7, 2005]

§ 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.

PRELIMINARY NOTES TO § 230.168. 1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. This section provides a non-exclusive safe harbor for factual business information and forward-looking information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information or forward-looking information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information or forward-looking information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer (and, in the case of an asset-backed issuer, the other persons specified in paragraph (a)(3) of this section) of communications containing factual business information or forward-looking information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied by any of the following:

(1) An issuer that is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(2) A foreign private issuer that:

(i) Meets all of the registrant requirements of Form F-3 (§ 239.33 of this chapter) other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a) of Form F-3;

(ii) Either:

(A) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(B) Is issuing non-convertible investment grade securities meeting the provisions of General Instruction I.B.2. of Form F-3; and

(iii) Either:

(A) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b)

(§ 230.902(b)) and has had them so traded for at least 12 months; or

(B) Has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; or

(3) An asset-backed issuer or a depositor, sponsor, or servicer (as such terms are defined in Item 1101 of Regulation AB (§ 229.1101 of this chapter)) or an affiliated depositor, whether or not such other person is the issuer.

(b) *Definitions.*

(1) *Factual business information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such factual business information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business;

(ii) Advertisements of, or other information about, the issuer's products or services; and

(iii) Dividend notices.

(2) *Forward-looking information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such forward-looking information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934:

(i) Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(ii) Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

(iii) Statements about the issuer's future economic performance, including statements of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in Item 303 of Regulations S-B and S-K (§ 228.303

and § 229.303 of this chapter) or the operating and financial review and prospects described in Item 5 of Form 20–F (§ 249.220f of this chapter); and

(iv) Assumptions underlying or relating to any of the information described in paragraphs (b)(2)(i), (b)(2)(ii) and (b)(2)(iii) of this section.

(3) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(4) For purposes of this section, in the case of communications of a person specified in paragraph (a)(3) of this section other than the asset-backed issuer, the release or dissemination of a communication is by or on behalf of such other person if such other person or its agent or representative, other than an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(c) *Exclusion.* A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.

(d) *Conditions to exemption.* The following conditions must be satisfied:

(1) The issuer (or in the case of an asset-backed issuer, the issuer and the other persons specified in paragraph (a)(3) of this section, taken together) has previously released or disseminated information of the type described in this section in the ordinary course of its business;

(2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations; and

(3) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

[70 FR 44807, Aug. 3, 2005]

§ 230.169 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information.

PRELIMINARY NOTES TO § 230.169. 1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. This section provides a non-exclusive safe harbor for factual business information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer of communications containing factual business information shall be deemed not to constitute an offer to sell or offer for sale of a security by an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied.

(b) *Definitions.*

(1) *Factual business information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business; and

(ii) Advertisements of, or other information about, the issuer's products or services.

(2) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter